MERDEKA UNIVERSITY BERHAD v. GOVERNMENT OF MALAYSIA

[O.C.J. (Abdoolcader J.) September 28-30, October 1-3, 5-7 & November 7, 1981]

[Kuala Lumpur — Civil Suit No. A6 of 1980]

Administrative Law — Claim for declarations that rejection of petition for establishment of Merdeka University null and void — Allegation that refusal of petition for establishment of the University unreasonable and improper exercise of discretion — Principles of judicial review — Effect of subjective formula as to satisfaction — Whether University a public authority within the definition of the Federal Constitution — National Language — Official purposes — Fundamental rights — Complaint of unfairness due to lack of dialogue — Changing content and ambit of rules of natural justice according to circumstances of case — National interest — Universal Declaration of Human Rights — Education Act, 1961, ss. 25 & 46 — Universities and University Colleges Act, 1971, ss. 3, 5, 6, 7, 8, 11, 12, 13. 15A & 15D — Federal Constitution, arts. 8(2), 12(1)(a), 40(1), 152 & 160.

Constitutional Law — Yang di-Pertuan Agong a constitutional monarch acting on ministerial advice — Principles of Constitutional interpretation — National Language — Whether University a public authority within the meaning of the Federal Constitution — Official purposes — National education policy — Allegation of discrimination — Intake of students — Private sector institution — Fundamental rights — Federal Constitution, arts. 8(2), 12(1)(a), 40(1), 152 & 160.

Education — Petition for establishment of University — Whether University a public authority under the Federal Constitution — National Language — Public purpose — National education policy — Private sector institution — Federal Constitution, arts. 152 & 160 — Education Act, 1961, ss. 25 & 46 — Universities and University Colleges Act, 1971, ss. 3, 5, 6, 7, 8, 11, 12, 13, 15A & 15D.

Interpretation — Principles of Constitutional interpretation — Maxim noscitur a sociis — Meaning of "using" in art. 152(1) of the Federal Constitution — Meaning of "expedient" — Interpretation by analogy.

The plaintiff, a company limited by guarantee, submitted a petition to the Yang di-Pertuan Agong for an incorporation order for Merdeka University under section 6 of the Universities and University Colleges Act, 1971. The petition was rejected and the Minister of Education announced that the rejection of the plaintiff's petition was for the following reasons: (a) Merdeka University would use Chinese as the medium of instruction; (b) it is meant to cater for students from Chinese independent secondary schools; (c) it is to be set up by the private sector; and as a composite for the basis of rejection that in effect its establishment would be contrary to the national education policy. The plaintiff requested a dialogue with the Minister but there was no response. The plaintiff issued a writ asking for a declaration that the rejection of the petition for the establishment of Merdeka University is null and void as it contravenes the Federal Constitution and for a declaration that the refusal of the petition to establish the University is an unreasonable and improper exercise of the discretion conferred by section 6 of the Universities and University Colleges Act, 1971.

Held: (1) it is a condition precedent to the exercise of the power of the Yang di-Pertuan Agong under section 6 of the Universities and University Colleges Act, 1971 to make an incorporation order that he has to be satisfied that it is expedient in the national interest that a University should be established. If he is not so satisfied he has no power to make an incorporation order and must accordingly reject the application. Even if the condition precedent is met, the Yang di-Pertuan Agong is left with a discretion as to whether or not to make an order and has the power but not the duty to do so, but as a general rule of law once the condition precedent is fulfilled then the power ought to be exercised unless it is impracticable to do so;

(2) the Yang di-Pertuan Agong is a constitutional monarch and is required under Article 40(1) of the Federal Constitution in the exercise of his function (except on certain matters that do not concern these proceedings) to act in accordance with collective or individual ministerial advice and not on his own initiative;

(3) the substantial questions arising for consideration in this case are whether or not in the exercise of his power under section 6 of the Universities and University Colleges Act, 1971, the Yang di-Pertuan Agong and in effect the defendant, the Government of Malaysia, took into account legally relevant considerations and acted fairly, there was any misdirection in fact or in law (including the provisions of the Federal Constitution), the decision was made on sufficient material and evidence or on extraneous considerations or was so unreasonable that no reasonable person could have come to it;

(4) the discretion conferred by section 6 of the Universities and University Colleges Act in the subjective form "if he is satisfied" does not exclude judicial review if objective facts have to be ascertained before arriving at such satisfaction. The discretion would be reviewable and the deciding authority has in fact to have reasonable grounds and it is insufficient if he merely thinks he has reasonable grounds. The test of unreasonableness is not whether a particular person considers a particular course unreasonable, but whether it could be said that no reasonable person could consider that course reasonable;

(5) the Constitution is not to be construed in any narrow or pedantic sense but this does not mean that the court is at liberty to stretch or pervert the language of the Constitution in the interests of any legal or constitutional theory or even for the purpose of supplying omissions or of correcting supposed errors;

(6) if the Merdeka University were established, it would be a public authority within the definition in Article 160 of the Federal Constitution and its purpose would accordingly be an official purpose within Article 152(6) of the Constitution and it would therefore be excluded by the parenthesis in proviso (a) to Article 152(1) from its protection. Consequently as the Merdeka University proposes to give instruction in its courses in Chinese, whether as the only or the main medium of instruction, the proviso would afford no protection for that purpose;

(7) the proposal to use Chinese as the medium of instruction would be contrary to the national education policy;

(8) the plaintiff cannot rely on the provisions of Article 8(2) of the Federal Constitution to argue that the rejection of the petition would result in discrimination in violation thereof. It is clear that the second reason for the rejection of the petition is intricately interwoven with the first reason on the question of language in relation to the medium of instruction and the negation of the national education policy and attracts the same consequences in its practical effect;

(9) on the evidence there was sufficient justification and basis for the defendant to rely on the financial aspect on the third reason, that the University is to be set up by the private sector, for the rejection of the petition;

(10) the point taken by the plaintiff that the reasons for the rejection of the petition are incompatible with Article 26 of the Universal Declaration of Human Rights does not arise in this case and in any event the pertinent provisions for consideration are those contained in municipal legislation. The court's power to make declarations is confined to matters justiciable in the courts and limited to legal and equitable rights and does not extend to moral, social or political matters;

(11) it is clear from the evidence, both oral and documentary that all relevant matters were before the Minister to enable him to come to a fair and reasonable decision and that he had sufficient material before him for consideration for this purpose. The petition was clear and unambiguous and the Minister said he considered with care all the relevant factors before coming to the conclusion that the petition could not be acceded to as he was satisfied that it was not expedient in the national interest to do so. The Minister did not decide arbitrarily without any basis and on the material before him he said that he required no further details as everything was clearly stated in the petition and there was nothing that needed clarification. In the circumstances of this case, the failure to accord a dialogue, with or without a request therefor, did not in any way affect the situation and the defendant therefore did not act unfairly in not entertaining the request for a dialogue;

(12) in the circumstances and on the evidence the Yang di-Pertuan Agong has acted properly, reasonably, fairly and in accordance with the law in the exercise of his broad discretion in the matter under section 6(1) of the Universities and University Colleges Act, 1971 on sufficient evidence and material and has taken all relevant matters into account without being influenced by any irrelevant considerations. The reasons given for the rejection of the plaintiff's petition clearly bear a vital nexus with the question of expediency in the national interest;

(13) on all the three reasons given for the rejection of the petition there was sufficient basis and justification for the Yang di-Pertuan Agong to be satisfied on any one or more of them that it was not expedient in the national interest for Merdeka University to be established.

Cases referred to:-

(1) *Mak Sik Kwong* v. *Minister of Home Affairs, Malaysia* [1975] 2 M.L.J. 168, 171.

(2) *Balakrishnan* v. *Ketua Pengarah Perkhidmatan Awam Malaysia and Government of Malaysia* [1981] 2 M.L.J. 259.

(3) *Blackburn* v. *Attorney-General* [1971] 1 W.L.R. 1037, 1041.

(4) *Julius* v. *Lord Bishop of Oxford* (1880) 5 App. Cas. 214, 225.

(5) *Mak Sik Kwong* v. *Minister of Home Affairs, Malaysia (No. 2)* [1975] 2 M.L.J. 175, 180.

(6) *Pahang South Union Omnibus Co. Berhad* v. *Minister of Labour and Manpower & Anor.* [1981] 2 M.L.J. 199, 202-203.

(7) *Secretary of State for Education and Science* v. *Tameside Metropolitan Borough Council* [1977] A.C. 1014, 1074.

(8) *Nakkuda Ali* v. *M.F. de S. Jayaratne* [1951] A.C. 66.

(9) *Liversidge* v. *Anderson* [1942] A.C. 206.

(10) *Regina* v. *Inland Revenue Commissioners, Ex parte Rossminster Ltd. & Ors.* [1980] A.C. 952, 1000, 1011, 1025.

(11) *Minister of Home Affairs* v. *Fisher* [1980] A.C. 319, 329.

(12) *Attorney-General of St. Christopher, Nevis and Anguilla* v. *Reynolds* [1980] A.C. 637, 655.

(13) *Teh Cheng Poh alias Char Meh* v. *Public Prosecutor* [1979] 1 M.L.J. 50; [1980] A.C. 458, 468.

(14) *Attorney-General of the Commonwealth, ex relatione McKinlay* v. *The Commonwealth of Australia* [1975] 135 C.L.R. 1, 17.

(15) *Public Prosecutor* v. *Datuk Harun bin Haji Idris & Ors.* [1976] 2 M.L.J. 116, 119, 120.

(16) *James* v. *Commonwealth of Australia* [1936] A.C. 578, 614.

(17) *Amalgamated Society of Engineers* v. *The Adelaide Steamship Co. Ltd.* (1920) 28 C.L.R. 129.

(18) *Griffiths* v. *Smith* [1941] A.C. 170, 178.

(19) *Attorney-General* v. *Company of Proprietors of Margate Pier and Harbour* [1900] 1 Ch. 749.

(20) *Ong Ah Chuan* v. *Public Prosecutor* [1981] 1 M.L.J. 64, 68; [1981] A.C. 648, 666.

(21) *New Plymouth Borough Council* v. *Taranaki Electric-Power Board* [1933] A.C. 680, 682.

(22) *Ram Chunder Dutt* v. *Jughesh Chunder Dutt* (1873) 19 W.R. 353.

(23) *State Trading Corporation of India Ltd.* v. *The Commercial Tax Officer & Ors.* A.I.R. 1963 S.C. 1811.

(24) *The Tata Engineering and Locomotive Co. Ltd.* v. *State of Bihar* A.I.R. 1965 S.C. 40.

(25) *State of Gujarat* v. *Shri Ambica Mills Ltd.* A.I.R. 1974 S.C. 1300.

(26) *Malone* v. *Metropolitan Police Commissioner* [1979] 1 Ch. 344, 352-354, 366.

(27) *Lim Cho Hock* v. *Government of the State of Perak & Ors.* [1980] 2 M.L.J. 148, 153.

(28) *Sarawak Electricity Supply Corporation* v. *Wong Ah Suan* [1980] 1 M.L.J. 65, 68, 70.

(29) *Payne* v. *Lord Harris of Greenwich & Ors.* [1981] 1 W.L.R. 754.

(30) *Bushell* v. *Secretary of State for the Environment* [1981] A.C. 75.

(31) *McInnes* v. *Onslow-Fane* [1978] 1 W.L.R. 1520.

(32) *Malloch* v. *Aberdeen Corporation* [1971] 1 W.L.R. 1578, 1582, 1595; [1971] 2 All E.R. 1278.

(33) *United Kingdom Association of Professional Engineers & Anor.* v. *Advisory, Conciliation and Arbitration Service* [1981] A.C. 424.

(34) *Pathumma & Ors.* v. *State of Kerala* A.I.R. 1978 S.C. 771, 774.

(35) *D.* v. *National Society for the Prevention of Cruelty to Children* [1978] A.C. 171.

(36) *Burmah Oil Co. Ltd.* v. *Governor and Company of the Bank of England & Anor.* [1980] A.C. 1090.

CIVIL SUIT.

Michael Beloff Q.C. (*Ker Kim Tim, Soo Thien Ming, Siew Yew Ming, Low Sik Thong, Ngeow Yin Ngee* and *Ong Tin Kim* with him) for the plaintiff.

Tan Sri Dato Abu Talib bin Othman, Attorney-General, Malaysia (*Lim Beng Choon,* Senior Federal Counsel with him) for the defendant.

Cur. Adv. Vult.

Abdoolcader J.:

EXORDIUM

Merdeka, proclaimed Tunku Abdul Rahman to the resounding echo of the populace, and so it came to be. But the cry for Merdeka University has not achieved the same response and result. And thus the matter comes before the court.

The future of the nation is on trial before me, so I am solemnly told, in this case in which the plaintiff, Merdeka University Berhad, seeks declarations against the defendant, the Government of Malaysia, that the rejection of its petition for the establishment of a private university to be known as Merdeka University is null and void in contravening the Federal Constitution and constituting an unreasonable and improper exercise of the discretion conferred on the Yang di-Pertuan Agong by section 6 of the Universities and University Colleges Act, 1971.

Let me immediately reiterate what I said in court at the outset of these proceedings: I am not concerned with the political undertones or overtones or whatever that may affect the questions raised in this action, and in this trial I am moved by no considerations other than that of determining the issues involved purely and strictly within the confines of the Federal Constitution and the law, abjuring any concomitant political or emotional offshoots springing like Athena from the head of Zeus in its wake. The Attorney-General, meaning well no doubt, presents a vision of doom when he speaks of the grim consequences that might ensue if grave circumspection is not exercised in weighing the respective interests involved, but my short answer to this is, as I said in court in anticipating Mr. Beloff for the plaintiff, *fiat justitia, ruat coelum* — let justice be done, though the heavens should fall. I said in *Mak Sik Kwong* v. *Minister of Home Affairs, Malaysia*[1] (at page 171), and I say again, the courts constitute the channel through which His Majesty's justice is dispensed to his people and are accordingly the bastion of their rights and the courts must therefore necessarily be the ultimate bulwark against the excesses of the executive, though I

should add that unconstitutionality and illegality of administrative action and not the unwisdom of legislation or executive discretion is the exclusive and narrow concern of judicial review and control of administrative acts.

It would perhaps be appropriate to clarify two matters at this exordial stage. First, the Yang di-Pertuan Agong is a constitutional monarch and is required under Article 40(1) of the Federal Constitution in the exercise of his functions (except on certain matters that do not concern these proceedings) to act in accordance with collective or individual ministerial advice and not on his own initiative (*Balakrishnan* v. *Ketua Pengarah Perkhidmatan Awam Malaysia and Government of Malaysia*[2]). The exercise of discretion impugned in the matter before me is accordingly in effect that of the defendant.

Second, a very material facet of the arguments addressed to me and which in effect constitutes the nub of the case around which they would appear to primarily revolve is the national education policy. Policy is a somewhat nebulous and amorphous concept difficult for the courts to discern as such until and unless it becomes apparent from a legislative measure which reflects and effectuates it. Salmon L.J., (now a Law Lord) stressed in *Blackburn* v. *Attorney-General*[3] (at page 1041) that political decisions have nothing to do with the courts which are concerned only with the effect of such decisions if and when they have been implemented by legislation. The national education policy has indeed been so implemented in the Education Act, 1961 and is disclosed and declared in the preamble thereto and more especially, in relation to the present proceedings, in the third recital thereof which refers to the requirement in securing the effective execution of the policy for provision in particular for the progressive development of an educational system in which the national language (namely, the Malay language as specified in Article 152(1) of the Federal Constitution) is the main medium of instruction.

PLAINTIFF'S PETITION: BACKGROUND OF EVENTS

The idea of founding Merdeka University ('MU' for brevity) was formed in 1967 through the initiative of certain Chinese guilds and associations under the leadership of the United Chinese School Committees' Association and the United Chinese School Teachers' Association ('the two Associations'), and on April 14, 1968 at an inaugural meeting of Chinese guilds and associations from all over the country at an assembly held at the Chinese Assembly Hall in Kuala Lumpur for the proposed university a Proclamation was passed and approved together with a draft plan for MU dated April 10, 1968 and issued by the Educational Committee of the two Associations. Lim Fong Seng, the Chairman of the plaintiff, states in his evidence that the Proclamation and Plan truthfully reflected the aims and intention of those who wanted to establish MU and that at that meeting a working committee was set up for its establishment according to the aims and intention evinced in these two instruments. He agrees under cross-examination that invitation to attend that meeting was only through the Chinese press and the intention was to confine it only to the Chinese community and adds that at the meeting no donations were made but there were pledges of financial support from all the people present, and further says that the public response was very good and donations for the plaintiff were received even before it was registered.

The plaintiff was incorporated on May 8, 1969 as a company limited by guarantee under the Companies Act, 1965 with its primary object as stated in its memorandum of association being 'to constitute, establish and carry on in the Federation of Malaysia a University for the promotion of learning, arts, science and research, the provision of higher education, and the conferment of degrees'. The plaintiff was unable to proceed further in the matter in view of the unfortunate turbulence that took place on May 13, 1969, and in the meanwhile the Universities and University Colleges Act, 1971 ('the 1971 Act') was enacted and came into force on April 30, 1971. Section 5 of the 1971 Act provides that no higher educational institution with the status of a University shall be established except in accordance with the provisions of the Act, and section 6 reads:

"6.(1) If, the Yang di-Pertuan Agong is satisfied that it is expedient in the national interest that a University should be established, he may by order —

(a) declare that there shall be established a higher educational institution having the status of a University, which shall be a body corporate, for the purpose of providing, promoting and developing higher education in all such branches of learning as shall be specified in the order;

(b) assign a name and style to that University; and

(c) specify the location of the site which shall be the seat of that University.

(2) An Order made under subsection (1) (hereinafter referred to as the 'Incorporation Order') shall, at the next meeting of Parliament, be laid before both Houses of Parliament."

On March 9, 1974 the plaintiff proceeded with a somewhat more modest proposal and applied under section 46 of the Education Act, 1961 to register a college (not of the status of a university or university college under the 1971 Act) to provide tertiary education and to be known as Merdeka College. The main medium of instruction was stated in the application to be Chinese, with Malay and English as subsidiary media. I should mention that the prospectus enclosed with the application specified the temporary location of the proposed college as the Kuen Cheng Girls' High School, Kuala Lumpur, with an ultimate intention to build premises of its own. The application was however refused on May 25, 1974 by the Secretary General to the Ministry of Education against which the plaintiff, according to the statement of agreed facts put in, appealed through its solicitors to the then Minister of Education but this too was rejected. There was no curial challenge to the rejection of this application.

The Council of the plaintiff at its meeting on April 23, 1977 resolved to adopt the Proclamation and Plan for MU referred to earlier and to submit a petition to the Yang di-Pertuan Agong under section 6 of the 1971 Act for an incorporation order for the establishment of the proposed MU based on the principle and objectives of these two instruments, and it also appointed a drafting committee for this purpose. Lim testifies that although in 1977 Malaysia

had five universities as against only one in 1968, there was still a need for another university because opportunities for tertiary education still remained insufficient, in particular, for those who are not Malays.

A petition dated January 30, 1978 praying for an incorporation order for MU under section 6 of the 1971 Act was accordingly submitted to His Majesty by the plaintiff and endorsed with the supporting signatures of some 4,238 Chinese guilds and associations throughout the country, and copies were sent to the Prime Minister, the Minister of Education and all members of Parliament. Lim says the signatures obtained signified majority support from the guilds and associations. The petition was in three texts — in Malay, English and Chinese. There are some variations between the Malay and English texts of the petition and in particular with regard to the medium of instruction, as the Malay version speaks of Chinese as the medium of instruction with the emphasising of the teaching of Malay and English whereas the English version refers to Chinese as a major medium of instruction and also high-lighting the learning and training in Malay and English. Datuk Musa bin Hitam, the Deputy Prime Minister and Minister of Home Affairs, Malaysia since July this year who was the Minister of Education in 1978 and at all times material to these proceedings, says in his evidence, and quite properly, that he considered the version in Malay which is the official language as the authoritative text, it being an official matter. I should perhaps also mention that in 1978 in accordance with the provisions of Article 153 of the Federal Constitution bumiputeras (literally meaning autochthons and in popular use in recent times as a composite term to denote Malays within the definition of Article 160 of the Federal Constitution and indigenes of the soil) were granted favoured access to the then established universities in the country.

There was a request by the plaintiff by a letter dated May 4, 1978 for a dialogue with the Minister to clarify matters if necessary or to volunteer further information and exchange ideas, followed by a reminder on September 11, 1978 but with no response to either. The Minister in a speech at the United Malays National Organisation ('UMNO') General Assembly on September 17, 1978 announced the rejection of the plaintiff's petition and gave as the reasons therefor:

(a) MU would use Chinese as the medium of instruction

(I should point out that the Minister in stating the basic reasons for the rejection in giving evidence speaks of Chinese as the main medium of instruction and in cross-examination states that even if Chinese were to be the major medium and not the only medium of instruction, it would still conflict with the national education policy);

(b) It is meant to cater for students from Chinese independent secondary schools;

(c) It is to be set up by the private sector;

and, as a composite of the basis for rejection, that in effect its establishment would be contrary to the national education policy.

The plaintiff issued a statement on September 22, 1978 as a result of the Minister's speech refuting the reasons given for the rejection of its petition and also sought to convene a meeting of Chinese guilds and associations at which, according to Loot Ting Yee, the Assistant Secretary of the plaintiff and Vice-Chairman of the United Chinese School Teachers' Association, some 8,000 representatives and observers would have attended but which however did not materialise for the reasons he gives.

In a debate in Parliament on October 10, 1978 on a motion to amend the 1971 Act the Minister explained why the defendant had to reject the application by the private sector to set up MU. The plaintiff wrote to the then Prime Minister on November 11, 1978 complaining of the Minister's lack of response to its request for a dialogue and his announcement of the rejection of the petition without any such dialogue and requesting one with the Prime Minister, but in a reply thereto on November 20, 1978 the plaintiff was told that as the matter would be debated in Parliament the Prime Minister did not think it desirable to have a dialogue with the sponsors as requested. In a further debate in Parliament on December 11, 1978 on a motion by the leader of the Opposition with regard to the establishment of MU, the Minister went into the reasons he gave at the UMNO General Assembly in September for the rejection of the plaintiff's petition and explained them at some length, and in dealing with the third reason, that is to say, that it is to be set up by the private sector, he said that the rejection on this ground only applies in the context of MU and does not cover proposals to set up any other private university or institution.

The Chief Secretary to the Government by a letter dated January 25, 1979 informed the plaintiff that His Majesty after consideration of the petition submitted had decided to reject its application for the establishment of MU.

RELIEF SOUGHT BY PLAINTIFF: BASIC ISSUES INVOLVED

The plaintiff as a result issued the writ in these proceedings on September 16, 1980 and claims as relief a declaration that the defendant's rejection of its petition for the establishment of MU is null and void as it contravenes the Federal Constitution and also a declaration that the refusal of its petition to establish MU is an unreasonable and improper exercise of the discretion conferred by section 6 of the 1971 Act. The plaintiff originally also sought by way of relief, but this has however now been abandoned in the course of the hearing, a further declaration that it has a right under the Federal Constitution to establish MU and a declaration in the alternative that the Education Act and/or the national education policy is unconstitutional and null and void and a consequential declaration that the defendant's rejection of its petition is null and void and a final declaration that it is entitled to establish MU.

The primal issues raised in this case resolve into the question as to whether the defendant has in the circumstances acted constitutionally, reasonably and fairly.

SECTION 6 OF THE 1971 ACT: PRINCIPLES OF JUDICIAL REVIEW

The power to establish and maintain a university was originally vested in the Minister of Education under section 25 of the Education Act, and in the exercise of his power under that provision he would obviously have to take into consideration the interests of education as such. That power was taken away by an amendment to that provision as a result of the enactment of the 1971 Act which by section 6 vested the power in the Yang di-Pertuan Agong and introduced the broader spectrum of expediency in the national interest.

To paraphrase section 6 of the 1971 Act, it is a condition precedent to the exercise of His Majesty's power to make an incorporation order under that section that (1) he has to be satisfied (2) it is expedient (3) in the national interest (4) that a university should be established. If he is not so satisfied he has no power to make an incorporation order and must accordingly reject the application therefor. Even if the condition precedent is met, His Majesty is left with a discretion as to whether or not to make an order and he has the power but not the duty to do so, but as a general rule of law once the condition precedent is fulfilled then the power ought to be exercised unless it is impracticable to do so (*Julius* v. *Lord Bishop of Oxford*[4] (at page 225 *per* Earl Cairns L.C.)). In the matter before me the reasons have been given for the exercise of the discretion under this statutory provision resulting in the rejection of the plaintiff's petition and the material question therefore arising is: Was there any proper basis in law for His Majesty not to be satisfied that it is expedient in the national interest that MU should be established and for the exercise of his discretion under section 6 of the 1971 Act in the way that he did?

Without embarking on a dissertation, it would suffice with regard to the principles of judicial review to refer to my judgments in *Mak Sik Kwong* v. *Minister of Home Affairs, Malaysia (No. 2)*[5] and in the Federal Court in *The Pahang South Union Omnibus Co. Berhad* v. *The Minister of Labour and Manpower & Anor.*[6] (at pages 202-203) which were relied on by counsel in argument. The substantial questions arising for consideration in this connection are whether or not in the exercise of his power under section 6 of the 1971 Act His Majesty and in effect the defendant took into account legally relevant considerations and acted fairly, there was any misdirection in fact or in law (and this includes the provisions of the Federal Constitution), the decision was made on sufficient material and evidence or on extraneous considerations or was so unreasonable that no reasonable person could have come to it.

It has been suggested in the past that the qualification of the statement of a power by introductory words in the form of a subjective formula such as His Majesty's satisfaction on the matters specified in section 6(1) of the 1971 Act might be sufficient to exclude judicial review, but the modern and correct view clearly is for an objective approach to the formula to be preferred and this means that the discretion would be reviewable and the deciding authority has in fact to have reasonable grounds and it is insufficient if he merely thinks he has reasonable grounds. The House of Lords established in *Secretary of State for Education and Science* v. *Tameside Metropolitan Borough Council*[7] that conferring discretion on an authority in the subjective form 'if he is satisfied' does not exclude judicial review if objective facts have to be ascertained before arriving at such satisfaction, and further that the test of unreasonableness is not whether a particular person considers a particular course unreasonable, but whether it could be said that no reasonable person could consider that course reasonable. This is the construction adopted by the Privy Council in *Nakkuda Ali* v. *M.F. De S. Jayaratne*[8] as against that of the majority in the House of Lords in *Liversidge* v. *Anderson,*[9] and in *Regina* v. *Inland Revenue Commissioners, Ex parte Rossminster Ltd. & Ors.*[10] the Law Lords have now openly acknowledged that the majority of the House in *Liversidge*[9] were expediently wrong and the dissenting speech of Lord Atkin was right (*per* Lord Wilberforce at page 1000; *per* Lord Diplock at page 1011; *per* Lord Scarman at page 1025).

It is now necessary to consider in the light of the principles I have referred to the reasons given for the rejection of the plaintiff's petition.

FIRST REASON: LANGUAGE OF INSTRUCTION

(1) *Principles of constitutional interpretation*

It will be necessary in connection with my discussion in this regard to deal with and construe certain provisions of the Federal Constitution and I should perhaps before doing so advert somewhat briefly and generally to the principles of constitutional interpretation which apply. The Privy Council held in *Minister of Home Affairs* v. *Fisher*[11] (at page 329) that a Constitution should be construed with less rigidity and more generosity than other statutes (also *Attorney-General of St. Christopher, Nevis and Anguilla* v. *Reynolds*[12] (at page 655)) and as *sui generis,* calling for principles of interpretation of its own, suitable to its character, but added that respect must be paid to the language which has been used, and in *Teh Cheng Poh alias Char Meh* v. *Public Prosecutor*[13] said (at page 468) that in applying constitutional law the court must look behind the label to the substance. Barwick C.J., said in the High Court of Australia in *Attorney-General of the Commonwealth ex relatione McKinlay* v. *The Commonwealth of Australia*[14] (at page 17): 'The only true guide and the only course which can produce stability in constitutional law is to read the language of the Constitution itself, no doubt generously and not pedantically, but as a whole: and to find its meaning by legal reasoning'.

I said in *Public Prosecutor* v. *Datuk Harun bin Haji Idris & Ors.*[15] (at page 120) that the Constitution is not to be construed in any narrow or pedantic sense (*James* v. *Commonwealth of Australia*[16] (at page 614)) but this does not mean that a court is at liberty to stretch or pervert the language of the Constitution in the interests of any legal or constitutional theory, or even, I would add, for the purpose of supplying omissions or of correcting supposed errors. The High Court of Australia in *Amalgamated Society*

of Engineers v. *The Adelaide Steamship Co. Ltd.*[17] eschewed so-called 'political criteria' in the interpretation of the Australian Constitution and so lessened considerably the range of circumstances where it might be called upon to intervene more directly in political processes.

(2) *Article 152 of the Federal Constitution*

I now advert to the provisions of Article 152(1) of the Federal Constitution which stipulate that the national language shall be the Malay language and shall be in such script as Parliament may by law provide but this is subject to a proviso which reads:

"Provided that —

(a) no person shall be prohibited or prevented from using (otherwise than for official purposes), or from teaching or learning, any other language; and

(b) nothing in this Clause shall prejudice the right of the Federal Government or of any State Government to preserve and sustain the use and study of the language of any other community in the Federation."

The first point for consideration is the meaning and effect in relation to the instant proceedings of the words in parenthesis in proviso (a) to Article 152(1), namely, 'otherwise than for official purposes'. So far as relevant for present purposes in respect of the definitions that follow, 'official purpose' is defined in clause (6) of Article 152 *inter alia* to include any purpose of a public authority and 'public authority' is defined in Article 160 to mean *inter alia* a statutory authority exercising powers vested in it by federal or State law or any officer or authority appointed by or acting on its behalf. The question that arises therefore is whether the language proposed for use in MU would be for an official purpose within the definition thereof in the context of Article 152(1) and this in turn resolves into the further question as to whether a university is a statutory authority exercising powers vested in it by federal law within the definition of 'public authority' in Article 160. I should just mention *en passant* that there is nothing in the context of Article 152 to exclude artificial persons and that the word 'person' in the proviso includes a body corporate such as MU would be if and when established.

Mr. Beloff submits in his opening address that a university, whether public or private, is not a public authority within the definition in Article 160 and is not popularly conceived as such but in his final address he modifies this somewhat and says that a private university cannot be a public authority. In support of his contention he refers to the case of a company incorporated under the Companies Act which he says would then equally come within the definition of a public authority in the Federal Constitution. The fallacy of this argument — and it involves the fallacy of *petitio principii* in that it begs the question — is that it equates every entity which is the creature of statute with an 'authority,' and as I indicated in the course of submissions the operative word in the definition in Article 160 must necessarily be the term 'authority', and for a person or body to constitute such an entity there must be some public element and utility in its constitution, operation, functions, powers and duties. Viscount Simon L.C. said in *Griffiths* v. *Smith*[18] (at page 178) with regard to the managers of a non-provided public elementary school that the body of managers are a statutory body created by the relevant statutes for the discharge of public duties and are not analogous to companies acting for profit as in *Attorney-General* v. *Company of Proprietors of Margate Pier and Harbour*.[19] I would point out that the plaintiff's petition and memorandum of association make it clear that the plaintiff is a non-profit making corporation and this equally applies to MU which it is sponsoring.

A university established under the 1971 Act, and there can be no difference whether it is public or private, clearly has the requisite public element as, quite apart from being involved in public education at the highest level, it is subject to some degree of public control in its affairs and involves a number of public appointments to office in its framework, acts in the public interest and is eligible for grants-in-aid from public funds. Under section 3 of the 1971 Act the Minister of Education is responsible for the general direction of higher education and the administration of the Act. A university can receive grants-in-aid authorised by Parliament under section 11 and in this connection the Minister of Education has certain supervisory responsibilities. His Majesty and in effect the defendant would be responsible for the establishment of a campus of a university and for making an order for this purpose in accordance with the provisions of section 12 and land may be acquired for the purposes of a university under section 13. The Minister of Education has also certain functions in relation to student activities and discipline under sections 15A and 15D.

The Constitution of a university must contain provisions for all matters set out in the schedule to the Act (section 8) and these give wide powers to His Majesty and the Minister of Education to control the administration of the university. The appointment of the Chancellor and Vice-Chancellor is to be made by His Majesty on ministerial advice and after consultation with the Council of the university in the latter case, and of the Deputy Vice-Chancellor by the Minister of Education. Appointments to the Council and Court of the university include those by His Majesty and the Rulers and Governors of the several States and the Council will also include designated Government officers. His Majesty has power to amend the Constitution of a university at any time (section 8(3)) and by order exempt, vary or add to any of the provisions of the schedule to the Act (section 26).

The public element I have referred to is therefore manifestly evident in the case of a university and evinces a distinction from an entity like a company incorporated under the Companies Act as clearly as chalk from cheese. A university is therefore an 'authority' and a 'statutory authority' at that as by the provisions of section 7(1) of the 1971 Act it is deemed to have been established upon the coming into force of the incorporation order made under section 6.

It is next necessary to consider whether a university exercises powers vested in it by federal law. It

clearly does and I would refer to the provisions of section 7(1) of the 1971 Act where its powers on establishment are enumerated therein in paragraphs (a) to (e) and the latter provides for the exercise, discharge and performance of all such powers, duties and functions as may be conferred or imposed on the university by the Act or the Constitution. The Constitution itself is provided for in the schedule to the Act and section 8(1) enacts that the Constitution of a university shall contain provisions for all the matters set out in the schedule and these incorporate a very wide range of powers. The powers therefore conferred on a university by its Constitution are themselves by the joint operation of sections 7(1)(e) and 8 vested in it by the 1971 Act itself. Mr. Beloff submits that the powers conferred by the Constitution of a university primarily relate to its internal management, but, even so, they are nevertheless still powers vested in it. There are moreover other powers vested in it by the Act, as, for instance, the disciplinary powers enacted in sections 16, 16A, 16B and 16C, and section 17 empowers a university by its Constitution to establish a provident fund scheme for its employees.

Mr. Beloff says that a body established by statute can have powers of both a statutory and non-statutory nature but he concedes in answer to me that on this argument such a body would be a public authority for some purposes but not for others — a conclusion resulting in such an extraordinary and schizophrenic state of affairs that it needs only to be stated to be rejected. It cannot but be repugnant to all accepted canons of construction and indeed to common sense to so construe a definition as to create as a consequence of its concept a sort of centaur — half man, half horse. It follows there is no justification either for his argument that in any event a private university cannot be a 'public authority' as both public and private universities are subject to the same considerations and are equally bound by the provisions of the 1971 Act.

In the premises I can only conclude that MU if established would be a 'public authority' within the definition in Article 160 of the Federal Constitution and that its purpose would accordingly be an 'official purpose' within Article 152(6) and it would therefore be excluded by the parenthesis in proviso (a) to Article 152(1) from its protection. Section 4 of the National Language Act, 1963-1967 provides that the Yang di-Pertuan Agong may permit the continued use of the English language for such official purposes as may be deemed fit. His Majesty made an order under this provision (P.U. 410 of 1967) which does not however affect the matter of MU as both the enabling provision and the order refer only to the English language and the order relates *inter alia* to training or examination where the approved course or the text of any subject is English. It does not therefore matter whether Chinese is to be the major or the only medium of instruction in MU as the protection of proviso (a) to Article 152(1) will not be available.

At the outset in the course of Mr. Beloff opening his case when I raised the question of the effect of a decision on this point he says it is important but not necessarily decisive, but when I repeated my question at the conclusion of his opening address he agrees that it is not only important but critical, as he puts it, and that the plaintiff's case would collapse if a decision is made against it on this point as he accepts that on his argument that MU would be entitled to use Chinese as the main medium of instruction, the converse must also necessarily apply in that if it were for an official purpose, it would be wholly precluded from doing so. The case for the plaintiff can therefore be disposed of on this point alone but in deference to the arguments that have been addressed to me I will proceed to deal with the other matters raised.

Another point taken with regard to proviso (a) to Article 152(1) of the Federal Constitution is the connotation of the word 'using' appearing therein. As a background to the argument raised it is pertinent to note that while the continued use of English is specifically provided for in clauses (2), (3), (4) and (5) of Article 152 there is no such specific provision enacted for the use of other ethnic languages, and I do not think it can be disputed as a matter of history that Malay and English have both been widely used hitherto for a considerable period of time both for official and unofficial purposes and that the other ethnic languages have also been used but not as a common medium of expression or communication but only intra-communally. The Attorney-General submits that proviso (a) merely maintains the use of the ethnic languages not as a medium of expression or communication for the nation as such but only to the extent of preventing the erosion of their use as a medium of expression within their respective communities. Mr. Beloff however disputes this and says that the word 'using' in the context of the proviso is as general a word as one can find and in its ordinary and natural meaning it connotes employing for any purpose whatsoever and is not limited other than by the parenthesis, and he goes on to say that the matter is put beyond doubt by the parenthesis itself, its implication being that without it the word 'using' would embrace use for official purposes.

Whether 'using' in the proviso bears the wider or the narrower meaning depends upon the context in which the participle appears, and its immediate context would seem to attract the maxim *noscitur a sociis*, namely, that associated words explain and limit each other (*Ong Ah Chuan* v. *Public Prosecutor*[20] (at page 666)). In its juxtaposition to 'teaching or learning' in the proviso and in the context of Article 152 read as a whole, I am of the view that 'using' is in fact confined to use as a medium of expression or communication within the language or ethnic groups concerned and cannot extend to user as a medium of instruction as such. If Mr. Beloff is right in his view, then, as he admits when I put it to him, the words 'teaching or learning' in the proviso would be redundant. I would add that the word 'use' in proviso (b) to Article 152(1) must necessarily have the same connotation and in effect substantiates the conclusion I have reached as to its ambit.

It is further significant that proviso (a) speaks of 'teaching or learning' and omits the preposition 'in' thereafter. It is quite clear that MU proposes to give

instruction in its courses in Chinese, whether as the only or the main medium of instruction, whichever it is, and the proviso accordingly affords no protection for that purpose. The omission of the preposition cannot be repaired in view of the express language of the proviso and no interpretation by analogy in this regard can be resorted to either. Words in a statute must be taken to be used correctly and exactly and the onus on those who assert that they are used loosely or inexactly is a heavy one (*New Plymouth Borough Council* v. *Taranaki Electric-Power Board*[21] (at page 682)). It was laid down by the Privy Council in *Ram Chunder Dutt* v. *Jughesh Chunder Dutt*[22] that 'arguments from analogy may arise where a principle of law is involved; but where the courts are dealing with the positive enactments of a statute, reasons founded upon analogies are scarcely applicable'.

(3) *Contravention of the national education policy*

Basically the rejection of the plaintiff's petition on the composite ground that it is contrary to the national education policy turns on the language of instruction in relation to the third recital in the preamble to the Education Act and in this context my discussion with regard to the purport and effect of the provisions of Article 152 of the Federal Constitution is pertinent and relevant.

It would be pertinent to refer to what the Minister has to say in his evidence before me in connection with the national education policy to amplify the objection to the proposal for MU in relation to the medium of instruction. He says that in connection with national objectives the education system is to be used as a means of national unification and the national language is to be the instrument by which Malaysians of different racial origins would be able to unite through a common language and the education system as enunciated by the education policy is to be the basis of this national objective. He goes on to say that based on these factors it is the determined aim to make the national language the sole medium of instruction in schools and for this ultimately to reach the highest strata of the education system, that is to say, the universities. He adds that since the petition clearly states that Chinese is to be the medium of instruction and that the position of both the national language and English is to be relegated only to the level of the teaching and learning of these languages, then this particular objective of the plaintiff is clearly against the national interest as the proposal to this effect would render the education policy meaningless. He testifies that the basic reason for advising His Majesty to reject the plaintiff's petition is that the medium of instruction to be used would cut across the national education policy and that even if Chinese were to be the major and not the only medium, it would still conflict with that policy. He states the medium of instruction in Government secondary schools is the national language and that it has already been declared it is also to be the sole medium of instruction in universities by 1983.

SECOND REASON: INTAKE OF STUDENTS: ARTICLE 8(2) OF THE FEDERAL CONSTITUTION

The plaintiff submits that it is not true to say that MU is meant to cater only for Chinese students or has the declared intention to have a racial bar and says that in any event that would not be unlawful under the Federal Constitution in the light of the provisions of Articles 8(2) and 12(1)(a) thereof. I cannot see how the plaintiff can rely on Article 12(1)(a) as, quite apart from the same consideration applying as in the case of Article 8(2) which I shall have to deal with presently, it refers to any educational institution maintained by a public authority which the plaintiff is not nor on its contention would MU be. The plaintiff contends that this second reason for the rejection of its petition would result in discrimination in violation of Article 8(2) against both potential students and the plaintiff's sponsors.

Article 8(2) prohibits discrimination against citizens only. The plaintiff, a body corporate, is not a citizen (*State Trading Corporation of India, Ltd.* v. *The Commercial Tax Officer & Ors.*;[23] *The Tata Engineering and Locomotive Co. Ltd.* v. *State of Bihar*;[24] *State of Gujarat* v. *Shri Ambica Mills Ltd.*[25]). The court cannot go behind the plaintiff to afford protection under Article 8(2) to its members or to students who would be enrolled in the proposed university (*ibidem*), and in any event no mention is made in the plaintiff's petition or memorandum of association of confining the enrolment of students to citizens or that even the plaintiff's members are citizens. Mr. Beloff says this can be presumed but I cannot see how any such presumption can be made.

Article 8(2) further refers to discrimination purely and solely on account of all or any one or more of the grounds mentioned in that clause and cannot apply if it is alleged to be on one or more of those grounds and also on other grounds as well (*Datuk Harun bin Haji Idris*[15] (at page 119)). Language in any event is not one of the prohibited grounds of discrimination in Article 8(2) and the Minister states in cross-examination that secondary schools perform a more general function but university education reaches a higher level and that it is the language aspect and not the racial aspect which is the basis for the second reason relating to the intake of students for the rejection of the plaintiff's petition. Mr. Beloff in his final address accepts this as a fair explanation by the Minister that race is not the basis of the rejection and that he was concerned only with the question of language, and now agrees that the exception clause in Article 8(2), referring no doubt to Article 152, would not preclule discrimination on language grounds and that it is accordingly not necessary to rely on Article 8(2) for that purpose.

The evidence adduced discloses that Chinese independent secondary schools have an intake of non-Chinese students of less than 5 per cent of its total enrolment. This is very minimal and in any event such students would also have no difficulty if Chinese were the main or only medium of instruction, and there would furthermore be no real prospect of applications for admission from students including Chinese from national type schools. The evidence also discloses that the majority of students in Chinese independent secondary schools do not have the necessary qualifications for entrance into local universities and

therefore have to go abroad, as the qualifying examination for such schools is the Senior Middle Three for which the medium of instruction is Chinese, and those going abroad with that qualification can only gain admission directly into some universities in Taiwan and the United States of America. I should add however that there is also some evidence that the intake of students from these schools into local universities has been reduced since 1974 because of the quota system based on the percentage of the various races.

The provisions of Article 8(2) cannot therefore in the circumstances afford any protection to the plaintiff and it is clear that the second reason in the matter of the intake of students is intricately interwoven with the first reason on the question of language in relation to the medium of instruction and the negation of the national education policy, and attracts the same consequences in its practical effect.

THIRD REASON: PRIVATE SECTOR INSTITUTION

It is common ground that finance for the project would be from voluntary donations from the Chinese community and fees collected as disclosed in the petition, in particular in the Malay version, the memorandum of association of the plaintiff and the evidence adduced, and, Lim adds in his evidence, also from the profits from the investment of the funds collected. The Minister says that he was not satisfied that the project is viable and has expressed apprehension that the defendant may have to bear the burden of taking over MU should its financial resources fail but the plaintiff argues that there is no evidence to this effect and in any event there is no legal obligation on the defendant to take over a private university but at best only a moral obligation if at all.

Lim says with regard to the prospect of getting donations for MU that as there are over 4,000 guilds and associations supporting the proposal and assuming each of them is prepared to donate an average sum of $10,000, then the donations would amount to some $40 million, and adds that all the rich Chinese would also donate. I should point out that the 4,238 signatories which are Chinese guilds and associations in support of the plaintiff's petition merely state they fully support the establishment of MU but make no mention of any financial support, and would add that the guilds and associations are themselves moneywise subject to the fluctuations of the economy, the certainties of which, particularly these days, are perhaps as rare as hen's teeth. Under cross-examination Lim agrees that if would-be donors renegue, there is nothing the university can do and on the matter of fees he says that these will depend on the amount required to run the university but concedes they will increase from year to year.

In answer to me Lim says he is quite convinced of the plaintiff being able to get donations but admits there is no guarantee as such that the financial commitments will be met and that, to use his words, 'it is a matter of hope and trust'. As a result of this statement Mr. Beloff put a question to him through me and Lim says that this reliance on hope and trust in respect of the financial commitments is the result of his very wide experience in the educational field. Perhaps I may not have had his vast experience in this sphere and I might appear cynical in saying, but I say it nevertheless, I would think that pure reliance on hope and trust and pledges and promises in regard to monetary expectations for a functional and necessarily expanding institution with recurrent expenditure might well as a general rule be the first step in flirting with insolvency. I should perhaps add that the plaintiff has now in hand donations collected before its incorporation in the region of some $600,000 but it has not been able to solicit or collect any further donations in view of the provisions of section 23 of the 1971 Act.

Turning now to the evidence of the Minister: He says that the defendant is fully aware of the financial implications of setting up a university in the country and that it is not so much the initial establishment of the university that is important but the fact that it should be sustained at a level that will make it worthy of its name. He goes on to say that the defendant is also aware of the tremendous interest in education in this country and that matters pertaining to education have always been looked upon by the people as the responsibility of the defendant, and that in view of this and the fact it was not the defendant's considered opinion that the plaintiff would be able to sustain MU, let alone launch it, it was evident in the final analysis that it would have been the defendant's responsibility to mount a rescue operation to save it should the necessity arise. He says that in the considered view of the defendant the notion of establishing MU on the basis of public donations is a most unreliable source of income to sustain it.

According to the Minister the cost of establishing a university would be large, based on the experience of the defendant itself which has done various exercises in costing for the five universities already established in the country and that based on this knowledge he did mention specific estimates of the cost to be expected in his speech in Parliament. He goes on to add that a university is not only made up of buildings which by themselves would incur a large amount of money but it would also have to be one that can afford to have the type of scholars and teaching staff of the quality that would have to be maintained to make it worthy of its name. He says under cross-examination that after receipt of the petition he consulted his officials and other Ministers including the Minister in charge of the education portfolio in 1974 who had had a meeting with the plaintiff in connection with the application to set up Merdeka College and from the record of that meeting the financial position of the plaintiff had not changed.

In answer to me Lim says that the plaintiff has made a reasonable forecast of the finance required for establishing MU and its running cost and that this was done by a committee in Taiwan in 1975. He states that this committee found that the plaintiff needed about $10 million to set up the university and the running cost would be less than $2,000 per student for the arts and science courses and that these were based on the Taiwan standard. When I drew the Minister's attention to this bit of evidence on the

question of costing, he says that it immediately crosses his mind that it would cost about $10 million to set up a vocational school and goes on to explain that he is not unaware that in some developing countries there are a number of institutions styled universities which are not of the defendant's standard or concept of a university.

Lim, as I have said, agrees that there is no assurance or guarantee in the matter of donations but only pledges of support. Several witnesses have testified for the plaintiff to the effect that Chinese independent secondary schools are financed by voluntary donations from the Chinese community, and the evidence also discloses that these schools have been able to get donations of some $32 million over a period of five years, and that the number of such schools has increased since 1961 and that there are presently some 50 to 60 of them with an enrolment of over 30,000 students. The Minister however under cross-examination testifies that at one stage in the history of this country Chinese secondary schools were given over to the defendant for financial reasons in order to maintain them and there are now only a small number of them. I think it is necessary however to bear in mind in relation to the evidence regarding financing for Chinese independent secondary schools that the establishment and maintenance of a university would certainly be a considerably more substantial and expensive affair.

The Minister in re-examination stresses that donations are an unreliable source of funds and more so if they come in the form of pledges. He says that he was aware of a similar exercise embarked upon by the Chinese community in Malaysia and Singapore with regard to the establishment of a similar sort of university, referring to Nanyang University, when pledges were made and funds initially poured in even from foundations at a time when the Chinese community both in Malaysia and Singapore could be considered the most wealthy in the country but yet that particular project failed, and although other reasons were attributed to the failure the question of funds featured very prominently in the various reports submitted to the Government then.

There is further the question of the location of the proposed university. There is none as yet and it is a pre-requisite for an incorporation order as section 6(1) of the 1971 Act specifically stipulates that an order for the establishment of a university must specify the location of the site which shall be the seat of that university. In answer to me Lim says that there is a location for MU on an 18 acre site in Kajang belonging to the Kajang Overseas Chinese High School but now donated to the plaintiff. He then qualifies that statement to say that that site was leased by the school to the plaintiff before the petition was presented for a period of 30 years and then goes on to say that these 18 acres are not sufficient for the university and that is why the location was not mentioned in the petition and adds that the plaintiff hopes some generous person would donate a site. He agrees that the plaintiff should have specified a location in the petition and that to date it has no location nor any firm promise therefor. He further says, rather vaguely, that people have mentioned they would give land for the university if permission was granted, and that when 'the green light', as he puts it, is given the plaintiff could easily get some rich Chinese to donate 200 or 300 acres of a rubber estate. I would pause to point out that this does not take into consideration questions of zoning and planning and also land use and conversion of title under the National Land Code, 1965 and other related considerations, and in any event it is hardly feasible and at best highly questionable for a university to be sited virtually in the middle of nowhere. The question of location is certainly an important factor on the monetary aspect and the Minister says he also took that into consideration in relation to the cost of establishing the university.

The Minister makes it clear in his evidence that he carefully considered the question of viability on the various aspects involved and on sufficient material and did not think it was viable in the context of expediency in the national interest. He explains that his statement in Parliament on December 11, 1978 that the rejection of the plaintiff's petition on the ground that MU would be a private university does not cover proposals to set up any other private university or institution was clearly meant to indicate that the application for MU was considered on the merits of the petition presented and that this reason did not necessarily apply so as to fetter the defendant's discretion in respect of any other such applications which would have to be considered on their own merits, and as I pointed out in the course of argument a proposal by an established and well-endowed foundation might well evoke a wholly different reaction. I think it should also be borne in mind that the plaintiff is a company limited by guarantee and not by shares, and in the event of its being unable to meet the financial commitments of the university, the liability of its members can only be implemented after the commencement of winding-up proceedings to the extent specified in section 18(1)(e) of the Companies Act in a sum not exceeding $500 each according to its memorandum of association.

Statistics have been put in evidence to show the establishment, development and operating expenses of established universities in the country. It is apparent from the evidence that the Minister gave careful thought to these and all other material pertinent to the question of viability in deciding against the plaintiff's proposal and I refer again to his statement that he is not unaware of a number of institutions in some countries which bear the style of a university but do not meet the expected standard and concept of such an institution.

Apropos the question of the defendant's obligation to take over a private university should it financially falter or fail, I cannot see how the defendant can idly watch from the side-lines and allow an institution of this status to fail or to carry on at a sub-standard level for want of financial means and support as it must of necessity feel it has some obligation in the matter, and more compulsive than merely moral at that, to the students and their parents and to the

nation and posterity as well 'in a field of such importance to the national welfare as education', to use the words of Lord Russell of Killowen in *Tameside*[7] (at page 1074), quite apart from the effect this would have on the national and international image of the country, and all the more so as it would be responsible for approving the establishment of the university in the first place.

I find on the evidence before me that there is sufficient justification and basis for the defendant to rely on this third reason for the rejection of the petition.

UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights was proclaimed and adopted on December 10, 1948 by the General Assembly of the United Nations. It is not a legally binding instrument as such and some of its provisions depart from existing and generally accepted rules. It is merely a statement of principles devoid of any obligatory character and is not part of our municipal law.

Mr. Beloff submits that the reasons for the rejection of the plaintiff's petition are incompatible with Article 26 of the Declaration which provides *inter alia* that technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit and that parents have a prior right to choose the kind of education that shall be given to their children. The Declaration sets out fundamental rights in absolute and unqualified terms and does not contain any precise specification of the extent or ambit of these rights, but a general limitation is laid down in clause 2 of Article 29 that in the exercise of his rights and freedoms, everyone shall be subject to such limitations as are determined by law as specified therein, combining in effect the traditional concept of the sphere of individual liberty with the modern rule of social purpose and social utility.

The national education policy reflected in the Education Act does however take into consideration the general principle that pupils are to be educated in accordance with the wishes of their parents in the second recital in the preamble thereto which declares that regard shall be had to this postulate so far as it is compatible *inter alia* with the policy set out in the first recital thereof to establish a national system of education but subject to the further requirement stipulated in the third recital and in particular that of making the national language the main medium of instruction. The point taken on behalf of the plaintiff in this respect does not therefore arise and in any event the pertinent provisions for consideration are those contained in our municipal legislation.

I would in disposing of this aspect of the matter briefly refer to what Sir Robert Megarry V.C., said in *Malone* v. *Metropolitan Police Commissioner*[26] (at pages 352-354, 366) with regard to the European Convention for the Protection of Human Rights and Fundamental Freedoms and repeat what I said in *Lim Cho Hock* v. *Government of the State of Perak & Ors.*[27] (at page 153) that the court's power to make declarations is confined to matters justiciable in the courts and limited to legal and equitable rights and does not extend to moral, social or political matters.

COMPLAINT OF UNFAIRNESS: LACK OF DIALOGUE

The firmly established and accepted principle that an administrative authority must act not only reasonably but also fairly is beyond dispute. The plaintiff alleges in this case however that the defendant has acted unfairly in denying it the dialogue it requested of the Minister and the then Prime Minister, and Mr. Beloff goes still further to say that the Minister had an obligation to have a dialogue which was necessary and essential even if the plaintiff had made no such request.

I should perhaps observe in this connection that the first request by the plaintiff for a dialogue with the Minister was made by a letter dated May 4, 1978, just over three months after the petition was presented on January 30, 1978. If a dialogue was indeed necessary before the petition could be considered and for a decision to be made, I would have thought the request would have been made much earlier and as soon as possible after January 30, and it might not be unreasonable to infer that this letter of May 4 was perhaps sent more as a result of impatience and frustration over the lack of information as to the result of the petition and as a polite and veiled form of prodding the defendant into action and was in effect a reminder as indeed the subsequent letter of September 11, 1978 was. As for the request made to the then Prime Minister I have already dealt with his reply of November 20, 1978 and the reason he gave for the undesirability of a dialogue in view of the then impending debate in Parliament.

Lim says in his evidence that the purpose of the request for a dialogue with the Minister was that there were many matters under the 1971 Act which the plaintiff felt required clarification and discussion. When asked to enumerate what those matters were, he says they pertain to the Constitution of the university, its location, the courses to be established and the name of the university, and for good measure adds the omnibus phrase 'also many other matters of details'. Before proceeding to deal with the necessity of a dialogue for the reasons he gives I would revert once again to Lim's evidence under cross-examination when he agrees that all the reasons for establishing MU were set out in the petition, that he was satisfied with the way the petition was drafted before he signed it, that he had established a case for the proposed university to be set up and that the petition was clear and unambiguous. I have already dealt with the financial viability aspect of the project in discussing the third reason for the rejection of the petition.

With regard to the Constitution of the university he agrees under cross-examination that this matter would only be relevant after an incorporation order has been granted. The courses to be established are set out in the petition which states that the plaintiff proposes 'to set up faculties of science, engineering, arts and commerce so as to align with the trend of promoting science and technology in the country'.

I cannot therefore see that any dialogue was necessary in regard to or would have affected the first two matters he speaks of before an incorporation order is granted. With regard to the name of the university the plaintiff has specifically prayed in its petition that the proposed university bear the name Merdeka — a designation and term of hallowed import and significance to the resonant cry of which the nation was born on August 31, 1957.

On the matter of the location of the university, I have already touched on this aspect in dealing with the third reason for the rejection of the petition. The location of the site which shall be the seat of MU was a pre-requisite before approval for its establishment can be given in the light of the provisions of section 6(1)(c) of the 1971 Act and it was the duty of the plaintiff to specify it in the petition. Lim agrees in answer to me that the plaintiff should have specified a location and that up to-day there is no location of the site for the proposed university. He speaks basically in terms of getting 'the green light' but the petition was for an incorporation order for MU under the 1971 Act and not a preliminary reconnaissance or inquiry as to the defendant's attitude to its establishment.

The question raised on this aspect of the matter is whether the defendant in effect acted unfairly in not having a dialogue with the plaintiff before His Majesty exercised his discretion under section 6 of the 1971 Act. The defendant's contention is that the plaintiff must reasonably be expected to have expressed and presented its whole case in the petition and it ought to have expected that the petition would be considered on the reasons advanced in it. The defendant in essence argues that even if the plaintiff is correct in now saying that some aspects of the petition required further elucidation, that would be no more than a mere elaboration of details and that no dialogue was therefore essential for the purposes of reaching a reasonable and proper decision in the circumstances.

It is clear from the evidence, both oral and documentary, that all relevant matters were before the Minister to enable him to come to a fair and reasonable decision and that he had sufficient material before him for consideration for this purpose. The petition was clear and unambiguous, as Lim says, and the Minister says he considered with care all the relevant factors before coming to the conclusion that the petition could not be acceded to as he was satisfied it is not expedient in the national interest to do so (*Sarawak Electricity Supply Corporation* v. *Wong Ah Suan*[28] (at pages 68, 70)).

I would in this regard revert to the application made by the plaintiff in 1974 to set up Merdeka College which I have referred to in outlining the background of events. Lim in his evidence under cross-examination says that when the application for Merdeka College was rejected there was a meeting with the then Minister of Education at the request of the two Associations at which there was a discussion with regard to Chinese education generally and the question of the rejection of the application for Merdeka College was also discussed. He says at that meeting the then Minister of Education explained that the reason for the rejection was that Merdeka College would be a school using Chinese as the medium of instruction and that this would be contrary to the defendant's aim of establishing a united Malaysian society. He agrees that the basis of the plaintiff's petition for MU is the same as that for the application for Merdeka College in 1974.

The Minister states in evidence that he did not entertain the request for a dialogue because the petition was very clear in its aims and objectives and stated clearly the reasons for the proposal to establish MU and that it contained all the facts relevant to the proposal for the formation of the university and details as to figures related to reasons for its establishment by the plaintiff, and he had all the material particulars to enable him to come to a decision on behalf of the defendant. He adds that on receipt of the petition he made a careful study of it on all aspects relating to the proposal for MU by utilising officials of his Ministry and looked at all records in this connection. Based on the records available he says that the proposal to set up MU was not a new one as a similar proposal had in fact been made previously which was substantially the same as that for MU, referring to the application to register Merdeka College. He says that that application was rejected on the ground that it was contrary to the national education policy and he goes on to say that the plaintiff had appealed to the then Minister of Education against the rejection and at the plaintiff's request there was a meeting with the then Minister who explained that the defendant could not accept the application therefor in that form because it was contrary to the national education policy on the aspect that the policy was aimed to create a united Malaysian nation using the national language as the language for national unification.

All this evidence of the Minister and Lim himself substantially dissipates the necessity for any dialogue in the circumstances. The Minister did not therefore decide arbitrarily without any basis and on the material before him he says that he required no further details as everything was clearly stated in the petition and there was nothing that needed clarification. He states that details of the working of a university are not necessary before an incorporation order is granted.

I would refer to *Pahang South Union Omnibus*[6] in this connection which reiterates (at page 203) that the rules of natural justice are not inflexible principles and may vary in their content in the circumstances of the case and in their ambit in the context of their application, and in which the Federal Court held there was no breach of natural justice in a trade union recognition dispute when the Minister of Labour and Manpower who had sufficient material before him for a decision denied a request for a further membership check in the presence of representatives of the parties involved. The scope of the duty to act fairly imposed on all administrative bodies by the rules of natural justice depends upon the subject matter and circumstances of each case, *Payne* v. *Lord Harris of*

Greenwich & Ors.,[29] and a recent illustration of this occurs in *Bushell* v. *Secretary of State for the Environment*.[30]

In *McInnes* v. *Onslow-Fane*[31] involving the refusal of a boxers' manager's licence by the British Boxing Board of Control, it was held that there was no duty to disclose reasons or grant an opportunity for a hearing and all that was required was that the Board should act honestly and without bias or caprice. I should mention that the allegations of bias, prejudice and discrimination in paragraph 7 of the plaintiff's reply in regard to the matter of not having been accorded a dialogue have not been pursued before me. In *Malloch* v. *Aberdeen Corporation*[32] Lord Reid (at page 1582) thought that if it could be clearly demonstrated that whatever the appellant in that case said could make no difference, that 'might be a good answer', and Lord Wilberforce said (at page 1595): 'A breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain'. This seems to imply that the discretion to refuse a remedy may be exercised when the court judges that natural justice would make no difference or that there was no prejudice.

In the circumstances of this case and on an application of the principles of law I have adumbrated I hold that His Majesty acting on the advice of the defendant had a sufficient basis for the exercise of his discretion under the 1971 Act, that the failure to accord a dialogue, with or without the request therefor, did not in any way affect the situation and that the defendant did not accordingly act unfairly in doing so.

QUESTION OF EXPEDIENCY IN THE NATIONAL INTEREST

Lim says in his examination-in-chief that he considers the proposed university would (a) contribute to Malaysia in that it will be able to produce useful professional graduates to help develop the country, (b) help to cut down on foreign exchange and (c) allay the dissatisfaction of parents whose children are unable to gain admission into local universities. He admits under cross-examination that there was no change in the aims and objective of the Proclamation of April 14, 1968 when it was adopted by the plaintiff at its Council meeting on April 23, 1977. He further agrees that a letter to the public and associations dated January 2, 1968 under a heading pertaining to the establishment of a Chinese university and issued by the Joint Chinese Education Working Committee of the two Associations and which appears in the Teachers' Journal which was put in evidence relates to the main aim and objective of the Proclamation and speaks of the establishment of a Chinese university, of Chinese education and of admission of students from Chinese Senior Middle schools and that the whole concept in that letter is a Chinese university to provide Chinese education for Chinese students. He also agrees that MU would be designed for non-Malay students and in particular for Chinese students who are unable to gain admission into local universities.

I have earlier touched on the reason given by the defendant for the rejection of the previous application to set up Merdeka College and Lim agrees under cross-examination that the basis of the plaintiff's petition to set up MU with Chinese as the major medium of instruction is the same as that in the application made in 1974 for Merdeka College. Loot also agrees under cross-examination that the main objective of the proposal for MU from 1968 to date is to establish a Chinese university to provide Chinese education but, he adds, using Chinese as the major medium of instruction and not the only medium and for a majority of Chinese students and not for Chinese students only. He agrees however that these Chinese students would come exclusively from Chinese independent secondary schools and also agrees that all meetings in connection with the establishment of MU were confined to the Chinese community.

The question for determination by me is not whether it is in the national interest that MU be established but whether His Majesty had a reasonable and proper basis for his satisfaction that it is not so expedient in the national interest. I would pause to briefly consider the connotation of 'expediency'. 'Expedient' is a word of large import and comprehends whatever is apt and suitable for the accomplishment of the specified object and furthering what is purposed, in this case the national interest — in brief, it connotes that the proposed course is conducive to the advantage of the end in view and not to its detriment.

The Minister states that he considered the petition on the material sufficiently placed before him and took into account strictly legal considerations. The court cannot don the mantle and assume the functions of His Majesty, and in effect of the defendant, in the exercise of his powers and duties under the 1971 Act and perhaps ultimately substitute its decision for his (*Mak Sik Kwong (No. 2)*[5] (at page 180)). The court cannot substitute its own judgment for that of His Majesty and will invalidate the exercise of his judgment or discretion only if satisfied that no reasonable person charged with his statutory responsibilities and with a due and proper appreciation of his statutory duties could have exercised his power in the way he did (*Pahang South Union Omnibus*[6] (at page 203), citing with approval and applying *United Kingdom Association of Professional Engineers & Anor.* v. *Advisory, Conciliation and Arbitration Service*[33]).

In the light of all the matters I have discussed and adumbrated, quite apart from the fact that I have held the application of the parenthesis regarding use for official purposes in proviso (a) to Article 152(1) of the Federal Constitution to be fatal to the plaintiff's case, I cannot but conclude — and in law there can be only one conclusion in the circumstances and on the evidence — that His Majesty has acted properly, reasonably, fairly and in accordance with the law in the exercise of his broad discretion in the matter under section 6(1) of the 1971 Act on sufficient evidence and material and has taken all relevant matters into account without being influenced by any irrelevant considerations. The reasons given for the rejection of the plaintiff's petition clearly bear a vital

nexus with the question of expediency in the national interest.

The defendant is not obliged to allow an application for the establishment of a university merely because there is a dire need for greater facility in university emplacement if for sound reasons it would not be expedient in the national interest to do so as stipulated in the 1971 Act, and in any event as the Minister states in evidence, this problem affects all sections of the population and, to use his words, is not confined to any one group but is a national phenomenon. He says that in considering the plaintiff's petition he had very much in mind the need for more places in local universities, and goes on to add that in considering the policy regarding the intake of students into local universities, the national interest has to be taken into consideration in view of the fact that in the past until 1970 the disparity in the intake of students amongst the racial groups as well as the opportunity for higher education was glaringly in favour of non-bumiputeras, and the objective of the national education policy was also to play the role of correcting, as he puts it, this hitherto unhealthy trend. In relation to the exercise to correct this imbalance, he also says that 'since 1978 the intake of non-bumiputeras into institutions of higher learning in the country has been such as to increase the number, rather percentage, of non-bumiputeras by 2 per cent each year'.

The national education policy reflected in the third recital in the preamble to the Education Act and the provisions of Article 152 of the Federal Constitution are designed to foster national unity in a multi-racial society, a rationale reflecting one of the tenets of the Rukunegara or National Ideology specified in the Proclamation thereof by His Majesty the Yang di-Pertuan Agong (*vide Gazette* Notification No. 4023 of 1970), and this must necessarily constitute a prime consideration of the national interest. The Minister says that he felt that the practical effect of MU would be divisive of a united Malaysian nation. Neither would it be expedient in the national interest if the precarious nature of the financial resources sought to be relied on for the establishment, development and operation of the proposed university is properly taken into account as I find it was.

The Minister states that the three reasons given taken together formed the basis for the rejection of the petition. I hold that on all the three reasons there was sufficient basis and justification for His Majesty to be satisfied on any one or more of them that it was not expedient in the national interest for MU to be established.

Private or sectional interests inconsonant with the larger and broader interests of the nation or the public must yield to the latter, a principle illustrated by such authorities as *Pathumma & Ors.* v. *State of Kerala*[34] (at page 774) and in the restatement in the recent spate of cases in England on public interest immunity as to which I need only refer to *D.* v. *National Society for the Prevention of Cruelty to Children*[35] and *Burmah Oil Co. Ltd.* v. *Governor and Company of the Bank of England & Anor.*[36] and also reflected in the injunction at the conclusion of the Roman Twelve Tables, *salus populi est suprema lex* — regard for the public welfare is the highest law.

THE RESULT

For the reasons I have given the plaintiff's claim for the declarations sought must fail and I accordingly dismiss it with costs.

Let me just add this. Neither victor nor vanquished as such emerges as a result of my decision. It reflects the triumph of the rule of law — a fundamental facet of the National Ideology.

[On an application by the Attorney-General the learned judge certified for two counsel.]

Claim dismissed.

Solicitors: *Baharuddin, Bernatt, Tan & Ker.*